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Supreme Court of the United States

No. 1166, October Term, 1966

H. T. JORDAN, JR., and GERVASE A. BRYANT

Petitioners,

VERSUS

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

(s) _____

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May, 1967

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INDEX

	PAGE
PETITION FOR REHEARING	1
JURISDICTION	
28 U.S.C.A. Rule 58, subsection 2	2
OPINIONS AND ORDERS	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	
Fifth Amendment	3
Sixth Amendment	3
STATUTE INVOLVED	
28 U.S.C.A. 753 (b) (1)	4 & 18
RULES OF CRIMINAL PROCEDURE INVOLVED	
28 U.S.C.A. Rule 52 (b)	4
RULES OF THE SUPREME COURT INVOLVED	
28 U.S.C.A. Rule 19, 1 (b)	4 & 20
28 U.S.C.A. Rule 40 (2)	4 & 20
STATEMENT	4
ABSTRACT OF EXCERPTS OF THE TESTIMONY OF GOVERNMENT WITNESSES IN CHIEF (R 1-132)	5
UNUSUAL COURT PROCEEDINGS	9
POINTS TO BE URGED	10
REASONS FOR GRANTING THE PETITION FOR REHEARING	11

PAGE

AUTHORITY:

Addison v. U.S., 317 Fed. 2nd. 808 (5th Cir.) 21

Black's Edition, P. 1151 16

Bihn v. United States, 328 U.S. 633, 638, 639, 66 S. Ct. 1172, 90 L. Ed. 1485 14

Brown v. U.S., 314 Fed. 2nd. 293 (9th Cir.) 21

Culpepper v. State, 161 S.E. 623 16

Fiswick v. United States, 329 U.S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196 14

Fowler v. U.S., 310 F2d 66 (5th Circuit) 19

Fox v. U.S., 45 F2d 364 17

Gordon v. U.S., 414, 73 S. Ct. 369 20

Kotteakos v. United States, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L.Ed. 1557 13

Krulewitch v. United States, 336 U.S. 440, 69 S. Ct. 170, 93 L. Ed. 790 14

Mates v. State, 165 N.E. 316 16

Parrott v. U.S., 314 F2d 46 (10th Circuit) 19

Stirone v. U.S., 314 Fed. 2nd. 253, (3rd Cir). 21

United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391 13

U.S. v. Ansani, 138 F. Supp. 454
240 F2d 216 Cf., Milner v. U.S., 77 S. St. 813 15

U.S. v. Holland, 264 F2d 346 15

U.S. v. Taylor, 303 F2d 165 (4th Circuit) 19

80 S. Ct. 98 15

C.J.S. Criminal Law 1428 and 1452 16

28 U.S.C.A. 753(b) (1) 18

28 U.S.C.A. Rule 19, 1(b) 20

28 U.S.C.A. Rule 26 20

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PETITION FOR REHEARING

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, H. T. Jordan, Jr., and Gervase A. Bryant, pray that this Honorable Court grant a rehearing herein and vacate the order made on May 8, 1967, denying their petition for a writ of certiorari to the United States Court of Appeals Tenth Circuit.

JURISDICTION

That the petitioners invoke the jurisdiction of the Court to file this petition for a rehearing, under the provisions of the Rules Of The Supreme Court Of The United States, 28 U.S.C.A. Rule 58, subsection 2.

OPINIONS AND ORDERS

That the trial court wrote no opinion. That the opinion of the appellate court affirming the judgment of the District Court, is appended to the petition for a writ of certiorari, and is officially reported in 370 F2d 126.

That this Court entered an order on May 8, 1967, denying the petition for a writ of certiorari.

That petitioners made application for an order staying notification of the denial order, and on May 13, 1967, this Court entered an order staying the issuance of the order denying the petition for writ of certiorari, pending the timely filing and disposition of a petition for a rehearing.

QUESTIONS PRESENTED

1. Is there a substantial failure of proof of the government in chief where there is no proof to establish a valid connection between the corpus delicti and the defendants named in the indictment?

2. Is there a substantial variance between the allegations of the indictment and the proof of the government that affects the material rights of these petitioners?

3. Where the government failed to offer competent proof, in chief, to sustain the material allegations of the indictment; would not the exercise of sound judicial discretion require the trial court to take judicial notice of the plain error and thereby cause the court to take corrective action to protect the rights of the accused?

4. In the administration of criminal justice, should this Court order a remand to the trial court for a hearing and completion of the record of the trial proceedings?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

Pertinent provisions as follows:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"
"* * * nor be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT:

Pertinent provisions as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial; * * * and to be confronted with the witnesses against him; * * * and to have the assistance of counsel for his defense."

STATUTE INVOLVED

28 U.S.C.A. 753 (b) (1)

RULES OF CRIMINAL PROCEDURE INVOLVED

28 U.S.C.A. Rule 52 (b):

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

RULES OF THE SUPREME COURT INVOLVED

28 U.S.C.A. Rule 19, 1 (b).
28 U.S.C.A. Rule 40 (2).

STATEMENT

Petitioners were convicted by a jury on a plea of not guilty, in the United States District Court for the Western District of Oklahoma, on counts one, six and ten, of a twelve count indictment for the violation of the Statutes 18 U.S.C.A. 371, 1010 and 2. That they each were sentenced to one (1) year imprisonment on the conspiracy count and they were placed on probation for five (5) years on the two substantive counts. (R 10, 11, 12 and 13)

The petitioners were correctly identified in the indictment as H. T. Jordan, Jr., and Gervase A. Bryant, respectively, (R 1-9); whereas, the proof of the government in chief at the trial (R I-132) identified the accused persons only as Hank Jordan and Dick Bryant, (R 16, 17, 66; 22, 25, 31, 81, 82; 34, 35, 36, 37, 39, 42 and 120) (See pages 5, 6, 7 and 8 of this petition)

ABSTRACT OF EXCERPTS OF THE TESTIMONY OF GOVERNMENT WITNESSES IN CHIEF (R 1-132)

These quotations illustrate that the government's proof in chief as to identifying these petitioners as being the accused, was at variance with the indictment, and wholly fails to connect petitioners with corpus delicti:

R 16:

"BRUCE D. MILLER, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Bruce D. Miller.

Q. Do you live at 201 Epperly Drive?

A. No, sir. We have moved to two miles east of Moore.

Q. Did you ever work for Hank Jordan and Dick Bryant?

A. Yes, sir."

"Q. And when you went to work for Hank Jordan what did you do?

A. Wiring houses and electrical contractor.

Q. Did you wire houses for Hank Jordan and Dick Bryant at the Beacon Realty Company?

R 17:

"Q. That house in Harrah, did you trade that in on a house from Dick Bryant and Hank Jordan?

A. Yes, sir.

Q. What was the address of the house you bought from Hank Jordan and Dick Bryant?

A. 1817 Melody Drive."

"Q. Did Hank Jordan allow you enough on the Harrah house for down payment and closing on the house at 1817 Melody Lane?

A. Give me that again."

On Plaintiff's Exhibit 1b:

R 66:

"Beacon Realty Co., Inc.

By Dick Bryant"

R 22:

"HOMER HILL, JR., called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Homer Hill, Jr.

Q. Where do you live?

A. I live at Jones, Oklahoma."

"You are married to Dick Bryant's wife sister?

A. Yes, sir."

R 25:

"Q. And when they got to the office they talked to Dick Bryant or Hank Jordan?

A. I made the appointment for Mr. Bryant to go see them, and I went with him to see them on both occasions."

R 31:

"Q. (By Mr. Parr) Mr. Hill, did you testify Dick Bryant had you get an employment verification from the Wicher Baptist Church?

A. "Yes, sir."

R 81:

"Plaintiff's Exhibit 5"

"Seller: Dick Bryant
Beacon Realty Co., Inc."

R 82:

"Beacon Realty Co., Inc.
By Dick Bryant"

R 34:

"THOMAS FRANKLIN JACKSON, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Thomas Franklin Jackson."

"Q. Do you know Dick Bryant and Hank Jordan?

A. Yes, sir."

"Q. You worked for him in March of '59. How did you happen to meet Hank Jordan?

A. The Midwest Paint and Flooring Company was working on a house they were building?

R 35

"Q. When you and Marvin McEntire were working there then how did you happen to meet Hank Jordan?

A. That particular day?

Q. Yes.

A. He come in while we were working in this house; just come in."

R. 36:

"Q. Who owned the Beacon Realty Company?

A. Hank Jordan as far as I could tell; a partnership, Hank and Mr. Bryant.

Q. Dick Bryant?

A. Yes."

R. 37:

"Q. I will ask you if you paid Dick Bryant three hundred dollars in cash on January 13, 1960?

A. No, sir."

R. 39:

"Q. Whom did you talk to?

A. Hank Jordan."

R 42:

"Q. You say Mr. Hank Jordan suggested you go in business for yourself. Is that right?

A. That is right."

R. 120:

"Beacon Realty Co., Inc.
By Dick Bryant"

"Beacon Realty Co., Seller
Dick Bryant, Seller"

UNUSUAL COURT PROCEEDINGS

During the course of the trial, the prosecuting attorney sought to introduce in evidence hearsay testimony. Defense counsel timely interposed an objection. The government attorney approached the bench and, out of hearing of the jury, these petitioners and the court reporter, made undisclosed, secret and off the record disclosures to the trial court, which secret disclosures prompted the court to overrule the petitioners' objections to the hearsay evidence; and the departure from the usual course of procedure is set forth, as follows:

R 18, 19:

(Bruce D. Miller, having been called as a witness on behalf of the government, was being examined by the prosecuting attorney, Mr. Parr)

"Q. Explain the communications from the Oklahoma National Mortgage Company. What did they pertain to?

MR. HARRI: Object to that as incompetent, irrelevant and immaterial. It would not be binding on us.

THE COURT: What is the point Mr. Parr?

MR. PARR: I will approach the bench and state it off the record if you like.

THE COURT: Very Well.

(Conference at bench between court and respective counsel of the record, and open proceedings resumed, as follows):

THE COURT: Overruled.

Q. (By Mr. Parr) Did anybody from the Oklahoma National Mortgage Company come out to see you with reference to 1817 Melody Drive property?

A. They called me on the telephone.

Q. What did they say to you?

A. They said the payments were three months behind and if the payments were not brought up to date they were going to start foreclosing proceedings. I made up the points on it, and Mr. O'Toole of the Oklahoma National Mortgage Company suggested that I try to get the deed straightened out, and he gave me a list of the deeds he needed to get it brought up to date, and I got them all, made the payments and the next day he called me and said there was one deed I got when I cleaned this up. He said the deed I gave the Beacon Realty Company had been put up for an $1800.00 loan, and if I would pay the $1800 he would give me a clear deed to the property."

POINTS TO BE URGED

1. The proof of the government in chief, at the trial, failed to connect these petitioners with the offenses alleged in the indictment.

2. That there is a variance existing between the allegations of the indictment and proof of the government, which very materially affects the substantial rights of the petitioners.

3. Plain error occurring at the trial which would have required the trial court, in the exercise of sound judicial discretion, to take corrective action to protect the rights of the accused in a federal court of justice.

4. In the alternative, petitioners, urge that in the administration of criminal justice, this Court should remand the case to the lower court so that the trial court may conduct further proceedings to correct and complete the trial record, to the end that it disclose certain "off the record" proceedings had before the trial court.

REASONS FOR GRANTING THE PETITION FOR REHEARING

This petition for a rehearing is not presented as an empty formality, but is presented to this Honorable Court in good faith and on the basis that petitioners contentions have great merit. The contentions herein urged will be restricted to substantial grounds that are avaialble to these petitioners, but not previously presented to this Court: which contentions are anchored upon constitutional guarantees, and are set forth as follows:

1. The proof of the government in chief, at the trial, failed to connect these petitioners with the offenses alleged in the indictment.

2. That there is a variance existing between the allegations of the indictment and proof of the government, which very materially affects the substantial rights of the petitioners.

3. Plain error occurring at the trial would require the trial court, in the exercise of sound judicial discretion, to take corrective action to protect the rights of the accused in a federal court of justice.

It has been clearly pointed out that the indictment names H. T. Jordan, Jr. and Gervase A. Bryant as the defendants. (R 1-9) (4th page of this petition)

It has been positively shown, by excerpts from the record, that the proof of the government in chief named one Hank Jordan and one Dick Bryant as the sole offenders of the statutes and offenses named in the indictment. (R 16-132) (Page 5 herein)

Therefore, it becomes very apparent that the allegations in the indictment and the proof of the government do not correspond.

We have a very novel question of federal law, which is of great importance in the administration of criminal justice.

The Sixth Amendment requires that the accused shall be definitely informed as to the charges against him. The Fifth Amendment guarantees one against being put in jeopardy twice. The decisions of our courts compel the prosecution to prove every material allegation of the indictment.

In the instant case we have H. T. Jordan, Jr. and Geryase A. Bryant named as the defendants and offenders of the statutes. The proof of the government at the trial established that one Hank Jordan and one Dick Bryant committed the offenses charged in the indictment.

We are presented with this novel question of federal law: Was it the duty of the trial court to take judicial notice

of this obvious error and to take necessary action to protect the accused on trial in a federal court of justice?

Petitioners point out that the trial court should have taken positive action to protect their rights. Such protective action would be within the spirit of the "due process of law" clause, as guaranteed to them in the Fifth Amendment. It would protect the integrity of the courts and be in the interest of a strong public policy. It would be in line with the principle announced in the cited cases herein.

As in the instant case; we cite from an applicable situation as found in *United States v. Atkinson*, 297 U.S. 157, 56 S. Ct. 391, wherein the doctrine of plain error is approved, and we quote from said opinion:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Plain error of constitutional dimensions, for example, will ordinarily be considered prejudicial per se. The standard to be applied on review was formulated in the leading case of *Kotteakos v. United States*, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L.Ed. 1557, wherein the Court reversed convictions for conspiracy on the ground that pleading of one conspiracy and the proof of several constituted a prejudicial variance.

To the same effect on the Plain Error Rule, see *Fiswick v. United States*, 329 U.S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196; *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 170, 93 L. Ed. 790; *Bihn v. United States*, 328 U.S. 633, 638, 639, 66 S. Ct. 1172, 90 L. Ed. 1485.

It has been positively established by the record set forth herein that there was a substantial failure of the proof of the government in chief to support a valid connection between the corpus delicti and these petitioners as they were correctly identified and named in the indictment.

There can be no doubt about the existence of a substantial variance between the material allegations of the indictment and the proof of the government in this respect; and we repeat that the petitioners were named in the indictment as H. T. Jordan, Jr. and Gervase A. Bryant, whereas the proof of the government, in chief, established that a Hank Jordan and a Dick Bryant, were the sole offenders of the law.

We have pointed out that the record definitely shows that the prosecution failed to meet the burden of proof to prove all the material allegations of the indictment against these appellants.

It is a general rule of law and consistently aproved by this Court, that:

> "allegations and proof must correspond is based on requirements that accused shall be definitely informed

as to charges against him, and that he may be protected against another prosecution for the same affense. *Berger v. U. S.* 55 S. Ct. 629. Also in *Bennett v. U. S.* 33 S. Ct. 288.

The prosecution must prove guilt as charged in the indictment. *U.S. v. Ansani*, 138 F. Supp. 454; affirmed in 240 F2d 216, Cf. *Milner v. U.S.*, 77 S. Ct. 813.

It is pointed out that in the instant prosecution, the burden of proof belonging to the government failed, and it is pointed out that where, as in the instant case, the defendant pleads not guilty, he places upon the government the burden of proving all essential facts alleged, whether they be characterized as jurisdictional or otherwise, and it was so held in *U.S. v. Holland*, 264 F2d 346, certiorari denied, 80 S.Ct. 98.

In the instant indictment the defendants are identified as H. T. Jordan, Jr. and Gervase A. Bryant. We challenge the record to show where in the evidence in chief these two accused individuals were so identified by the proof of the government. (R 16-132), (See pages 5, 6, 7 and 8 herein)

The prosecution offered evidence which names a Jim Jordan (R 42), Mr. Hank Jordan and Dick Bryant; but nowhere in this proof in chief do we find any evidence whatsoever to identify these two petitioners who are named in the indictment, namely: H. T. Jordan, Jr. and Gervase A. Bryant. (R 16-132)

Proof that is at a variance with and inconsistent with the indictment, as in the instant case, is fatal, because it affects the substantial rights of these petitioners. C.J.S. Criminal Law 1428 and 1452.

A misnomer is giving incorrect name to person in accusation, indictment, pleading, or other instrument. *Culpepper v. State*, 161 S.E. 623.

Webster's Third International Dictionary, on page 1444, defines mishomer as follows:

"Misnomer To Call by wrong name."

Black's Law Dictionary, Fourth Edition, on page 1151, defines misnomer to be:

> "Mistake in name, giving, incorrect name to person in accusation, indictment, pleading, deed or other instrument. *Culpepper v. State*, 161 S.E. 623."

It is pointed out that the danger of double jeopardy attaches in the instant case.

The doctrine of *'idem sonans'* is to identify party in evidence as party named in the indictment. *Mates v. State*, 165 N.E. 316.

It is settled law that where the information or indictment charges that an offense has been committed by one person and proof shows the offense was committed by another,

there is a fatal variance. This would be true if there was any reasonable doubt thereof, because the danger of double jeopardy would attach.

A variance arises, as in the instant case, "when the evidence shows that facts proven do not support, but are different from averments in the pleadings". *Fox v. U.S.*, 45 F2d 364.

It was held in *U.S. v. Wills*, that a variance in a criminal prosecution is an essential difference between the accusation and the proof. This is the fact situation in the instant case at bar.

It was held to be a fatal variance where the indictment charged an assault on one J. B. Denby, and the proof showed the assault was upon one J. M. Dendy, 266 S.W. 419.

In another applicable case, the indictment alleged one "Manian" with an offense, the proof showed that his name was "Mananianian". Held to be fatal variance. 137 N.E. 394.

Likewise, it was held that double jeopardy would attach where the indictment alleged that Samuel Horn defrauded John Adams, and the evidence showed that Sidney Horn defrauded Joseph Adams, 6 S.W. 96.

It is submitted that the prosecution failed in its evidence in chief to prove the material allegations of the indictment, and this was plain error.

Therefore, petitioners point out to this Court that where the government wholly failed to offer competent proof, in

chief, to sustain the material allegations of the indictment, it would be incumbent upon the trial court, in the exercise of sound judicial discretion, to take judicial notice of the plain error and require a court of justice to take corrective action to protect the rights of the accused on trial in a federal court.

Next, these petitioners contend that plain error occurred during the course of the trial which materially affected their substantial rights, when the prosecuting attorney made certain unreported disclosures, in open court, to the trial judge, for the sole purpose of inducing and swaying the court to make a favorable ruling on the objetcion of defense counsel to the introduction of prejudicial heresay testimony. (R 18, 19) (Page 9 of this petition)

Petitioners urge that in the administration of criminal justice, this Court remand the case to the lower court to correct and complete the trial record, to the end that it disclose certain "off the record" proceedings had before the trial court.

This contention is based squarely upon a statutory provision found in the Court Reporters Act, 28 U.S.C.A. 753(b)(1). The applicable provisions of the statute are as follows:

> "(b) One of the reporters appointed for each court shall attend at each session of the court and at every other proceedings designated by rule or order of the court or by one of the judges, and shall record verbatum

by shorthand or by mechanical means which may be augmented by alectronic sound recording subject to regulations promulgated by the judicial conference: (1) *All proceedings in criminal cases had in open court.* (emphasis ours)

In *Parrott v. U.S.*, 314 F2d 46 (10th circuit) it was held:

"Unavailability of full transcript because of failure of court reporter to transcribe voir dire examination as required by this section made it impossible for reviewing court to determine whether statement by trial court in voir dire that three other charges of bank robbery were pending against defendant was harmless and to be disregarded ,and, accordingly, the conviction was required to be reversed and the case remanded for a new trial."

In *Fowler v. U.S.*, 310 F2d 66, (5th Circuit) it was held:

"Where in Federal prosecution for unlawful purchase and sale of heroin, no transcript of the record had been made of argument of counsel and where reviewing court was therefore unable to determine whether attorney had made prejudicial comment requiring reversal, new trial was mandatory."

In *U.S. v. Taylor*, 303 F2d 165 (4th Circuit) the Court held:

"Failure to keep complete records of criminal proceedings may be considered in collateral proceedings in determining whether defendant is entitled to hearing on motion to vacate sentence and in determining whether sentence should be vacated."

In *Stephens v. U.S.*, 289 F2d 308 (5th Circuit) it was held:

"Failure of court reporter to record proceedings in open court in prosecution for violation of Mann Act, Section 2421 required new trial."

Petitioners pray that this Court, in the administration of federal justice, order this matter remanded to the trial court for further proceedings to complete and supplement the record pertaining to the so-called "off the record" proceedings (R 18, 19), wherein the prosecuting attorney, in the course of the trial, wrongfully made certain disclosures to the court out of the hearing of the jury, the petitioners and the court reporter, for the sole purpose of inducing the trial court to make a favorable ruling on an objection by opposing counsel to the introdutcion of "hearsay evidence"; which unrecorded disclosures of said prosecuting attorney did influence the court and caused the court to make an unusual departure from the usual and accepted course of judicial procedure and permitted impermissible evidence to go to the jury, to the substantial prejudice of the petitioners. (Page 10 herein)

It is urgently pointed out that upon the correction and completion of the record to include these secret disclosures, this Court could fully consider whether or not the prosecuting attorney's disclosures were a valid reason for this unusual departure of the trial court from the accepted and usual course of procedure, and whether or not these disclosures were justified and proper when weighed against the denial of the petitioners' constitutional right of confrontation and cross-examination of the witness testifying against them at the trial. Fifth and Sixth Amendments: Rules of The Supreme Court, 28 U.S.C.A. Rule 19, 1(b); *Gordon v. U.S.*, 414, 73 S. Ct. 369; Federal Rules of Criminal Procedure, 28 U.S.C.A. Rule 26.

It is pointed out that fundamental fairness has now been positively denied to these petitioners by reason of the trial court's failure to have required the court reporter to have performed his statutory duty and thereby preserved for the record the secret and undisclosed statements made to the trial judge, in open court, but without the hearing of the jury, these petitioners and the court reporter. These unrecorded statements were intended to and did sway and persuade the trial court to permit impermissible evidence to be considered by the jury without giving these petitioners an opportunity to cross-examine their accusors. How can this Court determine the issues without a full record? This novel question of federal law has not been before this Court for a determination, however, a number of circuit courts have held that it is mandatory that the court reporter make a full and complete record of all proceedings had in open court in a criminal prosecution. On the other hand these decisions are in direct conflict therewith: *Stirone v. U.S.* 314, Fed. 2nd. 253, (3rd Cir); *Addison v. U.S.*, 317 Fed. 2nd. 808, (5th Cir.); *Brown v. U.S.*, 314 Fed. 2nd. 293, (9th Cir.).

CONCLUSION

Petitioners have clearly pointed out to the Court, in support of their petition for a rehearing, that plain error occurred at their trial, which very materially affected their substantial rights to their prejudice.

This novel and conflicting federal question, as to whether or not it is a statutory duty and, therefore, mandatory that the federal court reporter must make a record of all the proceedings had in open court, is a very vital question of public importance and it should be decided by this Court, because of the conflicting decisions of the various Circuit Courts.

It is respectfully submitted that the relief sought herein should be granted to these petitioners.

(s) _____

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Of Counsel

May, 1967

CERTIFICATE

Howard K. Berry, Jr. certifies that the foregoing petition for a rehearing is presented in good faith and not for delay. That the federal questions of law presented are restricted to substantial grounds available to the petitioners and not previously presented to this Court.

Dated this 26th day of May, 1967.

(s) _____

HOWARD K. BERRY, JR.
Counsel for Petitioners